PUBLIC PROSECUTOR v. LEE KEE CHANG

[A.Cr. J. (Chang Min Tat J.) December 7, 1973]
[Ipoh: Perak Criminal Appeal No. 32 of 1973]

Customs and Excise — Customs duty — Import of goods — Uncustomed goods — Whether total amount uncustomed or difference between actual amount of goods taken and that on which duty had been paid — Power of court to amend charge — Customs Act 1967, s. 135.

The accused was charged with being knowingly in possession of 3005.5 yds of cloth in 90 bales on which duty amounting to $3,077.05 had not been paid. The accused had imported by means of the postal services, the 90 bales at the expressed total cost of $7,819.50 and another consignment of 25 bales of the same kind of goods. The importer declared in his importation form the area of cloth imported in square yards and indicated the length as 910.7 yards. The accused had declared 910.7 yards and paid the duty assessed by the customs officer at the post office on this yardage. But he had taken delivery of 3005.5 yards, an excess of 2094.8 yards. This extra yardage had not been declared and cleared for importation and duty had not been assessed or paid. The defence submitted that customs duty had in fact been paid and the goods could not be uncustomed goods. The accused was acquitted and discharged without his defence being called. The prosecution appealed.

Held, allowing the appeal: (1) the court having the power to amend charges, the charge should have been amended to one of being knowingly in possession of goods, to wit, 2094.8 yards on which duty amounting to $2,279.14 had not been paid:

(2) the accused could only be and should be charged with failure to pay the duty assessed on the price determined by the customs officer at the post office and not at the price subsequently imposed;

(3) the case should be remitted to the learned President with a direction to amend the charge and to call for the defence.

Cases referred to:-

(1) *R.* v. *Cheah Teow Peng* [1952] M.L.J. 216.

(2) *Ismail* v. *Public Prosecutor* [1949] M.L.J. 139.

CRIMINAL APPEAL.

Ahmad Fadzil Omar (Deputy Public Prosecutor) for the appellant.

Vincent Ng for the respondent.

Chang Min Tat J.: This is an appeal by the learned Deputy Public Prosecutor from the decision of the President, Sessions Court at Ipoh to discharge and acquit the accused at the close of the case for the prosecution and without calling for the defence on a charge, as amended, of being knowingly in possession of 3005.5 yds. of Polyster Fancy cloth in 90 bales on which duty in the sum of $3,077.05 had not been paid.

The facts were not greatly in dispute. The accused was an importer, *inter alia*, of this particular brand of merchandise from Singapore. His *modus operandi* was to import the goods via the postal services. He had an invoice of the goods in question. It was dated 8 January 1973. It showed an importation of 3127.8 yds. in 90 bales at an expressed cost of $2.50 per yard. The total cost was therefore $7,819.50. The accused at about this time also ordered another consignment of the same kind of goods, 910.7 yds. of the cloth in 25 bales. The invoice was dated 10 November 1973.

Now as proved in the case for the prosecution, it was the usual practice of the postal authorities on receipt of the goods to give a written advice in Form JK-78 to the importer that the goods had arrived and that the goods could be taken delivery of. The number of parcels, if more than one, would as in this case be indicated on the advice form by the corresponding number. On receipt of such advice, the importer would have to repair to the post office, present to the customs officer stationed there a customs import declaration form in quadriplicate with particulars filled in by him and attested in the usual form of declaration of the correctness of the entries. The importer was also to show the invoice to substantiate his statement of the quantity and cost of the goods in question, but of course the customs authorities were not bound to accept such evidence as conclusive proof and it was open to them to readjust the price to what they considered was the correct or appropriate value of the goods. Customs duties, at the rates imposed in accordance with the taxing code would be imposed and upon payment of such duties, the importer would be allowed to take delivery of the goods.

In this particular case, the importer declared in his importation form the area of the cloth imported in square yards. This was rather curious and totally unasked for. Somewhere he also indicated the length as 910.7 yds. He was taxed on this yardage. At $2.50 per yard, the total cost was $2,276.75. This price the particular customs officer was not prepared to accept. He put in his own valuation which was at $3.20 per yard and assessed the duty on a valuation of $2,914.24. The duty was 25% for import duty, 4% for surtax and 5% for sales tax. He accepted the yardage at 910.7. The total duty came to $1,033.10. The importer paid this duty and a further sum of $36 for storage charges and was then allowed to take out the goods. The goods covered in the later order had not then arrived. No postal advice was sent out or received and no delivery was possible or made.

A customs party was apparently suspicious of this transaction. It followed the importer to his office and there the members took possession of the 90 bales and relevant documents, amongst which were the invoices for the 90 bales and for the 25 bales and the importer's copies of his customs import declaration.

It was the contention of the prosecution that there had been an evasion of customs duties by the importer. The first charge preferred was fraudulent evasion of the full amount of the duty on 90 bales of the cloth which it assessed at $3,077.05. This figure was arrived at on the customs' *subsequent* (a word which I am italicising for reasons which I will try to make clear later on) valuation at $4.50 a yard. The charge was in the course of the trial amended to one of being knowingly in possession of 3,005.5 yards of uncustomed cloth, on which the customs duty of $3,077.05 had not been paid. The yardage was the actual length as found by the customs by measurement.

On this prosecution case, the defence submitted that customs duty had in fact been paid and the goods could not be uncustomed goods. This submission was accepted by the learned President and the accused was thereupon discharged and acquitted without his defence being called.

One of the grounds of appeal by the learned Deputy Public Prosecutor was that the learned President was wrong in holding that the goods were customed.

The question whether goods on which some duty had been paid could nevertheless be said to be uncustomed for the purpose of establishing criminal liability appears to verge on metaphysics but with respect, it is not necessary that the question be put in this way. The accused had declared 910.7 yds., and paid the duty assessed on this yardage. But he in point of fact had taken delivery of 3,005.5 yards., an excess of 2,094.8 yards. This extra yardage had not been declared and cleared for importation. Duty had not been assessed or paid. In accepting delivery of this extra yardage the accused came knowingly into possession of these goods on which duty had not been paid, an offence under section 135(1)(g) of the Customs Act 1967 and punishable under section 135(1)(i).

In this connection, I should make clear that so far as criminality was concerned, the accused could only be and should be charged with failure to pay the duty assessed on the price as determined by the customs official at the post office and not at the price subsequently imposed. This must appear to accord with common sense and propriety, especially in the absence of any complicity on the part of this particular official in defrauding the government of the proper duty. If he, as the person with the primary duty of assessing the duty at the right valuation, set the price at $3.20 per yard, then duty should be paid at this price. If, as the customs contended, the correct valuation was $4.50 per yard, it was always open to them under section 17 of the Customs Act to claim for the extra duty on the difference of $1.30 per yard, by way of a civil demand, but this difference cannot clearly be the subject of a charge. This must be seen to be so, since the taxing code was the same, *i.e.* the rate of duty was the same.

The fact therefore is not that the accused had not paid any duty on the 3,005.5 yards imported by him, but that he had paid the duty at the valuation determined by a customs official on 910.7 yards only. This means, in other words, that the accused had not, on the prosecution evidence, paid any duty even at the valuation of $3.20 per yard on the balance of 2,094.8 yards. The charge should therefore have been amended to one of being knowingly in possession of goods, to wit 2,094.8 yards of cloth, on which duty had not been paid. The duty would be on a valuation of 2,094.8 yards X $3.20 *i.e.* on $6,703.36. Duty at 25% import duty, 4% surtax and 5% sales tax would come to $2,279.14.

That a duty lies not only on the part of the prosecution to amend the charge to fit with the facts of each particular case, there can, I conceive it, be no doubt; see, *inter alia*, *R.* v. *Cheah Teow Peng*.[1] In a proper case, the court could amend the charge: see *Ismail* v. *Public Prosecutor*.[2]

On this charge, the defence should have been called. The defence should be heard to explain, on a balance of probabilities that he was not knowingly in possession. It might be, as disclosed in cross-examination, a mistake ascribing the yardage of 910.7 yards from the later and still unarrived purchase of cloth in 25 bundles to the 90 bundles that had arrived. It might be that it was a genuine mistake. But the point is, the defence should be heard to explain why 910.7 yards were given as the yardage of the goods actually imported and the trial court should then determine whether the explanation, whether this or any other, was sufficient to establish, on a balance of probabilities, that no offence had been committed.

An opportunity was afforded to learned counsel for the respondent to make a further reply to the view I had taken and which I made known in open court at the first hearing. Counsel made a written submission and indicated he would not want to address me orally. With respect, his contention that the whole importation became customed goods disregards the facts of the case and ignores the basic fact that the importer had declared 910.7 yards but taken delivery of 3,005.5 yards.

The appeal is therefore allowed and the case is remitted to the learned President with a direction to amend the charge in accordance herewith and to call for the defence. I should add that an opportunity should be given to the defence to recall any witness who had given evidence for the prosecution for further cross-examination if desired by the defence, as required in such circumstances.

Appeal allowed.

KING HOCK CHING v. UNG SIEW PING

[O.C.J. (Tan Chiaw Thong J.) December 13, 1973]
[Sibu — Civil Suit No. 102 of 1972]

Probate and Administration — Letters of administration — Foreign grant — Authentication — Effective date — "Assets" — Meaning of — Administration of Estates Ordinance (Sarawak Cap. 80 of the 1946 Rev. Edn.), s. 14.

The plaintiff was suing in the capacity of an administrator of his late mother's estate. The letters of administration concerned were issued in Singapore. The defendant sought to set aside the writ for nullity. The issues before the court were: (a) whether the Singapore letters of administration confer title upon the plaintiff to sue as administrator of the estate of Madam King Mui Yin (deceased) without anything more being done in respect of it; and (b) whether a subsequent authentication of these letters of administration by a probate officer under section 14 of the Administration of Estates Ordinance (Cap. 80 of the 1946 Revised Edition of the Laws of Sarawak) confers such title upon the plaintiff, and if so, with effect from when?

Held: (1) the Singapore grant by itself conferred no title on the plaintiff to institute the action in this case as administrator of the estate of the deceased and the writ was therefore a nullity;

(2) an authentication made under section 14(1) of the Ordinance has the effect of a grant by the probate officer in respect of the assets of the deceased specified in the schedule to such authentication. Such authentication took effect from the day on which it was made and has no retrospective effect.

As the authentication here took place after the institution of proceedings in the case the plaintiff had no title to sue.

Meaning of "assets" discussed.

Cases referred to:-

(1) *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 All E.R. 1130.